IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF NEVADA,
In and for the County of Ormsby.

Marion W. Buckley, Plaintiff
vs.
Joseph W. Buckley, Defendant.

Action brought in the District Court of the First Judicial District of the State of Nevada, Ormsby County, and the complaint filed in the said county, in the office of the Clerk of said District Court on the 2d day of December, A. D. 1905.

THE STATE OF NEVADA SENDS GREETING TO
JOSEPH W. BUCKLEY,
Defendant.

You are hereby required to appear in an action brought against you by the above named Plaintiff, in the District Court of the first Judicial District of the State of Nevada, Ormsby County, and answer complaint filed therein within ten days (exclusive of the day of service) after the service on you of this Summons is served in said county, or if served out of said County, but within the District, twenty days, in all other cases forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain the judgment and decree of this court that the bonds of matrimony heretofore and now existing and uniting you and said plaintiff to be forever annuled and dissolved upon the ground that at divers times and places since said marriage you have committed adultry with one Kate Cottrell, and particularly that from about the 9th day of June 1900 to and including, the 13th day of June, 1900, at the Charing Cross Hotel in the city of London, England, you lived and conabited with said Kate Cottrell.

All of which more fully appears by complaint as filed herein to which you are hereby referred.

And you are hereby notified that if you fail to answer the Complaint, the said Plaintiff will apply to the Court for the relief herein demanded.

GIVEN under my hand and Seal of the District Court of the First Judicial District of the State of Nevada in Ormsby County, this 2d day of December, in the year of our Lord one thousand nine hundred and Five.

H. B. VAN ETTEN, Clerk.
(SEAL).
Geo. W. Keith,
Attorney for Plaintiff.

Notice of Application for Permission to Appropriate the Public Waters of the State of Nevada.

Notice is hereby given that on the 12th day of Sept., 1905, in accordance with Section 23, Chapter XLVI, of the Statutes of 1905, one Philip V. Mighels and Frank L. Wildes of Carson, County of Ormsby and State of Nevada, made application to the State Engineer of Nevada for permission to appropriate the public waters of the State of Nevada. Such application to be made from Ash Canyon creek at points in N E ¼ of S W ¼ of section 10 T 15 N R 19 E by means of a dam and headgate and five cubic feet per second is to be conveyed to points in N E ¼ of S W ¼ of section 11, T 15 N R 19 E., by means of a flume and pipe and there used to generate electrical power. The construction of said works shall begin before June 1, 1906, and shall be completed on or before June 1, 1907. The water shall be actually applied to a beneficial use on or before June 1, 1908.

Signed:
HENRY THURTELL,
State Engineer.

SCHOOL APPORTIONMENT.
STATE OF NEVADA,

Department of Education,
Office of Superintendent of Public Instruction,.

Carson City, Nevada, July 11, 1905
To the School Officers of Nevada:

Folowing is a statement of the second semi-annual apportionment of School Moneys for 1905, on the basis of $6.990202 per census child:

Counties	children	Amt.
Churchill	135	$ 943 68
Douglass	317	2,215 90
Elko	1,120	7,829 02
Esmeralda	217	1,516 97
Eureka	389	2,719 20
Humboldt	743	
Lander	318	
Lincoln	764	
Lyon	490	
Nye	85	
Ormsby		
Storey	389	
Washoe	2,412	16,860 36
White Pine	525	3,669 85
Total	9,430	$65,917 61

SUPREME COURT DECISION.

IN THE SUPREME COURT OF THE STATE OF NEVADA.

Rosan Gulling, Executrix, and Charles Gulling, Executor of the Estate of Martin Gulling, deceased.
Respondents
v.
Washoe County Bank,
Appellant.

Messrs Goodman and Webb, Dodge and Parker, Attorneys for Respondent.
Messrs Cheeney and Massey, Attorneys for Appellant.

OPINION

On March 1, 1893, James Pollock, his wife Delia and Daniel Powell, who are admitted to have been the owners at that time, executed to B. U. Steinman and C. H. Cummings as trustees, a trust deed for certain property near Reno to secure the payment of a promisory note of the same date given by the Pollocks and Powell to Farmers and Mechanics Savings Bank of Sacramento for $8,000 and interest. This deed directed the trustees in case of default in payment, to sell the property at Sacramento after giving notice, to apply the proceeds in satisfaction of the note and costs of sale and to pay any excess to the grantors.

On August 31, 1895, the Pollocks and Powell executed to Martin Gulling a mortgage on the same premises for $2,082.60, and interest thereon from that date at eight per cent per annum, which is sought to be foreclosed in this action and which specified that it was given subject to the trust deed. On February 23, 1897 the Pollocks and Powell conveyed their interest in the property to Washoe County Bank for a stated consideration of $14,000.00, which comprised the amount of $8,800, estimated to be due to the Farmers and Mechanics Bank of Sacramento on the note secured by the trust deed and $5,200 due from the Pollocks and Powell to the Washoe County Bank on unsecured notes which were surrendered to them. On February 26, 1897, the Farmers' and Mechanics' Savings Bank commenced suit to recover the amount due on its note stated at $8,639.73, and for a forclosure of the trust deed and sale to satisfy that amount against the Pollocks, Powell, Thomas E. Haydon, Henry Anderson, John Doe, Richard Roe, Michael Doe, B. U. Steinman and C. H. Cummings Neither Martin Gulling nor the Washoe County Bank were named as parties in the complaint, but both were served with summons under the ficticious designations of defendants who were alleged to have some title, claim or interest which was second and subordinate to the right of the Farmers' and Mechanics Bank arising from the trust deed. On March 8, 1897 Martin Gulling filed an answer in that action in which the name of Washoe County Bank is not mentioned in the title, body or prayer. It stated that its allegations were made "in obedience to summons therein issued and served upon him and answering the complaint therein." In this answer he admitted the priority of the claim of the Farmers and Mechanics Savings Bank under the trust deed, thereby avoiding any real issue with the plaintiff, but he alleged the execution of the mortgage to him by the Pollocks and Powell, that other persons claimed an interest in the premises which was subsequent to his mortgage, and he asked for judgment against the morgagors for principal, interest and attorney fees, for the usual decree of sale, that the proceeds be applied first to the satisfaction of any judgment which Farmers' and Mechanics Bank might obtain, and second to the payment of any judgment he might recover, that he have execution for any deficiency against the Pollocks and Powell, and that they, Thomas E. Haydon, Henry Anderson, B. U. Steinman and C. H. Cummings and all persons claiming under them subsequent to the execution of his mortgage be barred and foreclosed of all right, claim or equity of redemption.

On March 20, 1897, twelve days after Gulling filed his answer, Steinman and Cummings, acting as trustees and after notice given, sold the property at the court house door at Sacramento to the Washoe County Bank for 9,100 the amount due the Farmers' and Mechanics Bank on the note secured by the trust deed and the sum estimated for costs. Over four months later and on July 21, 1897, Washoe County Bank filed its answer without naming Gulling in the title and prefaced its averments with the recital that "as required by summons served on said Bank and answering said summons and the complaint filed in said action" it made its allegations setting out the execution of the trust deed, the sale thereunder and the deeds from Steinman and Cummings as trustees and from the Pollocks and Powell to Washoe County Bank. These facts, and they controlled the court later in its decision in that case, do not purport to be stated against Gulling. But directly after their statement as so alleged in answer to the complaint, follows an allegation in the nature of a conclusion of law, "that the equities of all the other defendants, including Gulling, were foreclosed and barred," and a demand for a decree accordingly against them and the plaintiff. This answer does not in any part of it purport to allege as a cross complaint or in terms as against Gulling the sale under the trust deed by the trustees to Washoe County Bank, nor does it appear to have been served upon him. He filed no demurrer, answer or reply to it and the record indicates that he offered no evidence regarding it.

The case came to trial on January 14, 1898. The plaintiff, Farmers' and Mechanics Savings Bank, and the defendants, Washoe County Bank, Gulling and Anderson, each appeared by counsel and Haydon in person. It is stated in the findings that the plaintiff having before the hearing made and filed a disclaimer of all interest in the action, and an admission that Washoe County Bank had succeeded to the interest of plaintiff, thereupon rested. That Martin Gulling offered and submitted evidence and proofs and thereupon rested and that Henry Anderson, Washoe County Bank and "the defndants and each of them, having submitted evidence and proofs in support of the issues made by them in their answers, the case was submitted to the court." The fair inference from the language and from the fact that he was first to submit proofs is that he introduced evidence to support the allegations of his answer which averred the execution and non-payment of his mortgage, but that he did not offer any in relation to other facts alleged in the answer of Washoe County Bank. The findings and decree in that action disposed of the claims of these other defendants and found and declared that the sale and deed made by the trustees was in accordance with the terms of the trust deed and that by such sale and deed all the interest in the property was conveyed to Washoe County Bank clear of Gulling's mortgage, and that the latter was entitled to a judgmeat against the Pollocks and Powell for the amount due on his note but not to a degree of foreclosure. The findings recite that "defendant Gulling was made a party to the action and was duly served with process therein, and in due time filed his answer to plaintiff's complaint," but it does not appear that there was any other service upon him, or issue made that rendered him liable beyond the allegations and demands of the complaint, or that would cut off his right by reason of the sale by the trustees which did not take place until after he had filed his answer. The court found in both actions that $8,800.00, estimated to be the amount due the Farmers' and Mechanics' Bank and notes held by Washoe County Bank against the Pollocks and Powell for $5,200.00 unsecured after the execution of the mortgage to Gulling, consituted the consideration expressed at $14,000.00 for the deed from them to Washoe County Bank, and that the property was worth about that sum at the date of the trustees' sale and the time of the trial.

A blank space in the decree in the first action for judgment in the amount owing by the Pollocks and Powell to Gulling on his note and mortgage remains unfilled. The case now before the Court was brought by Martin Gulling on June 9, 1902 against Washoe County Bank as grantee to foreclose his mortgage so executed on the premises by the Pollocks and Powell before they deeded to defendant, and is now prosecuted by the representatives of his estate. The defendant pleads by way of estoppel, the judgment in the former action and claims that by it Gulling was, and his executors are barred and foreclosed of all right to proceed against Washoe County Bank. The district court was of the opinion that in the earlier suit it did not have jurisdiction to make the judgment effective in quieting the title of appellant against Gulling, and it has now entered a decree of foreclosure and sale to satisfy his mortgage, from which this appeal is taken.

The important questions under the record and elaborate and interesting briefs are whether the matters relating to the trustees' sale determined in the former action were within the issues as between Gulling and appellant, and if they were not, whether he waived the framing of issues so that he became bound by the decree. The facts stated in the complaint of Farmers and Mechanics Savings Bank avering the execution of the trust deed were not denied by any of the parties. The statute, at least in favor of the plaintiff, raised denials of the facts alleged in Gulling's answer. These were in regard to the execution and non-payment of his mortgage and did not relate to the trustees sale which took place after his answer had been filed, and, therefore, if any issue existed regarding this sale it must have been founded on the answer of the Washoe County Bank. On its behalf it is urged that the answers of Gulling and the Bank made a direct issue of his right to have the property said to pay his debts, but this is dealing with conclusions and not with facts upon which issues are based. Gulling did not raise any issue regarding the trustees sale for his only answer was filed before the sale and before the answer of the Washoe County Bank in which it was alleged, and did not mention the name of the latter.

On behalf of appellant it is urged that the only pleadings provided or allowed by the Practice Act for the allegation of facts are a complaint by the plaintiff and an answer by a defendant, and that in determining the rights of co-defendants between themselves an answer is the only pleading permissable and that its allegations are deemed denied by statute, when it states a cause of action against a co-defendant, the same as if it relates new matter against a plaintiff. For respondent a different view is taken and it is claimed that under Rose v. Treadway, 4 Nev., 460, and other cases cited, that ordinarily the defendants in an action are not as between themselves adversary parties, that they become such only when one files a pleading in the nature of a cross-complaint seeking affirmative relief against another, that when this is done they lose their identity as defendants and for the purposes of the cross-complaint assume the relation of plaintiffs and defendant, that the one against whom the cross-complaint is filed is of necessity entitled to all the rights of an adversary including that of being served with, and of having an opportunity of pleading to the cross-complaint, and that the statutes having failed to designate the methods of pleading between co-defendants equity practice must be followed. If it be conceeded for the argument that the statute as claimed for appellant, denies any new matter which one defendant may allege against a co-defendant and that no answer or reply thereto is required it would still be a dangerous precedent, which we would be reluctant to establish, to hold that the statute denies for a co-defendant facts not alleged against him but stated in the answer of another defendant to the complaint, or that an issue would be raised against a co-defendant by the mere filing without service of an answer containing new matter alleged against the complaint of the plaintiff. The answer of Washoe County Bank in the former suit not having been served upon Gulling, and he having filed no demurrer, answer or reply to it, which would have been a waiver of service, we feel constrained to hold that it raised no issue against him, and if we concede for the purposes here that denial by statute without any pleading in reply is sufficient between co-defendants, such denial ought not to become operative before service. White v. Patton, 87 Cal. 151; Clements v. Davis, 76 Ind., 631. To hold otherwise or establish a different practice, might cause litigants to suffer a great injustice. An answer to a complaint ought to be served upon the plaintiff but if it is not he may be expecting it, or to secure a default, he could not obtain judgment without being aware of it, and would not be likely to go to trial without being prepared to meet the statutory denial in his behalf of any new matter it alleged. It is different between co-defendants. Usually their interests are not adverse, except to the plaintiff, and one defendant may not expect that another defendant will set up a cause of action and seek a judgment against him, and if he does he should not be required to watch the court records as Gulling could have done for over four months after his answer was filed to ascertain whether any of his co-defendants filed a cross-complaint against him, in order that answer was filed, to ascertain whether he might be prepared to meet it. Until he is warned by service of the pleading and demand or waives service or issue, he ought not to be bound by any judgment based upon it.

If the Farmers' and Mechanics' Savings Bank instead of the Washoe County Bank had bought the property at the trustees' sale and relied upon its purchase, necessarily it would have pleaded the fact by supplemental complaint, and they would not have been considered denied by Gulling's answer to the original complaint, and without service upon or waiver of service by him, a valid judgment based upon facts occurring after he had been served with the original complaint and filed his answer thereto, could not have been taken by default against him. In Mitchess v. Mitchell, 79 P. 50, 28 Nev., we set aside the action of the district court whereby it granted a plaintiff relief not demanded in the complaint served upon the defendant. That was pursuant to statute, but there is no more reason for holding a defendant liable on a judgment based on a cross-complaint or pleading of a co-defendant without service, than on one resting on a complaint of a plaintiff which has not been served. In neither case should the rights of the parties be concluded without service or a waiver thereof.

It is said that service of the answer of the Washoe County Bank will be presumed, if necessary to support the judgment. "The judgment roll and the papers" in the first case were introduced on the trial and are brought here in the statement on appeal, and the case rests upon them and not upon presumptions, and the burden of establishing estoppel is upon the defendant. If any admission on affidavit of service was made it should be among those papers but none appears and therefore we must conclude that the answer was not served.

The return of the Sheriff and recital in the findings indicate that Gulling was served with summons, and the findings state that in due time he appeared and filed his answer to the complaint. Under these circumstances further service will not be presumed. Galpin v. Page, 18 Wall, 366.

Beyond that appellants answer in the present case does not allege that the answer of Washoe County Bank was served upon Gulling in the other suit and is defective in this vital respect. Its allegations follow the facts disclosed by the record of the former action which show no service, and it states the conclusion that by the filing of the former answer an issue was raised against Gulling.

Numerous cases are cited by appellant halding that by going to trial on new matter alleged in the answer without a reply thereto, a reply is waived even in states where the statute provides for one. If this be the rule ordinarily in actions between a plaintiff and defendant or where by cross complaint new matter is alleged against a co-defendant, and the latter appears and introduces evidence in regard to it the rule ought not to apply to cases like the present one where the co-defendant is in court for other purposes and the answer is in reply to the complaint and does not state the new facts as a cross-complaint or cause of action against the co-defendant, is not served or replied to by him, and he introduces no evidence concerning it, and other parties participate in the trial. There being no service upon Gulling, no demurrer, answer, reply or testimony by him in relation thereto, the allegations in the answer of Washoe County Bank stating the facts in relation to the sale and deed by the trustees which controlled the court and which are directed against the complaint and not against Gulling, are too slender a thread to sustain the judgment against him. As respondent contends, he could be in court for some purpose and not for others. He could be bound as far as process or proper allegatins and demands had been served upon him to the extent that he had waived time or made other issues himself, without becoming liable further. This is well illustrated by the finding, conclusion and direction of the court that Gulling have judgment against the Pollocks and Powell for the amount due on his note and mortgage. If the space left for this in the judgment has been filled, or if the court has made a decree of foreclosure in favor of Gulling, both would have been void against the Pollocks and Powell for lack of service as is the judgment against them based on the trustees sale and it has been held that if one of the parties to a judgment is not bound, the other is not. They had been served by the Savings Bank with complaint or summons seeking the foreclosure of the trust deed and filed a demurrer. For the purpose of that complaint and to the extent of its demands they were in court or were bound, but a judgment against them for the amount or foreclosure of the Gulling note and mortgage, when they had not been served with pleading or process regarding these would have been void. The court has jurisdiction of the subject matter of all questions involved in this litigation, but of the parties no further than they presented themselves or were served with pleadings or process or waived service or issues. If a complaint and summons on a demand for one thousand dollars is served upon a defendant, a judgment for ten thousand would be void, because the district court would have jurisdiction over him to the extent of only one thousand, while as far as subject matter is concerned, it has jurisdiction in any amount.

The facts were quite different and the principal involved distinguishable in Maples v. Geller, 1 Nev., 236. There an answer which did not demand judgment upon new matter was filed to the complaint but not served. The question was not between co-defendants. The court said that the filing of the answer gave it jurisdiction over the defendant. Stripped of dicta that decision propertly determined that the filing of an answer to the complaint without service prevents a judgment for the plaintiff by default. While here we hold that property rights cannot be lost or adjudicated upon an answer or pleading by a defendant seeking affirmative relief on new facts against a co-defendant without service or an issue or waiver.

Questions are presented upon the record in this case whether or not, under the provisions of the practice act of this State, the answers filed by Martin Gulling and the Washoe County Bank in the suit instituted by the Farmers' and Mechanics' Savings Bank, in so far as they sought affirmative relief against co-defendants, are answers as contemplated by our statute, or whether they are in fact equitable cross-bills. If the latter, whether or not, under the practice act, they are permissible pleadings, and further, if permissible pleadings, whether or not the dismissal of the plaintiff's complaint would not require the dismissal of the entire proceeding. These questions, however, under the view we have taken of this case are not deemed necessary to be determined.

The judgment and order of the district court are affirmed.

Talbot, J.

I Concur:
Norcross, J.
I Dissent:
Fitzgerald, C. J.

Filed Nov. 28, 1905.
W. G. Douglass,
Clerk.
By J. W. Legate,
Deputy.

ANNUAL STATEMENT
Of The State Life Insurance Company
Indianapolis, Ind.

Capital (paid up)	none
Assets (admitted)	3,160,083 31
Liabilities, exclusive of capital and net surplus	2,615,497 63
Income	
Premiums	4,046,907 77
Other sources	197,125 01
Total income, 1904	4,224,032 78
Expenditures	
Losses	380,902 69
Dividends	65,240 11
Other expenditures	1,050,102 76
Total expenditures, 1904	1,416,245 56
Business, 1904	
Risks written	23,276,143 00
Premiums thereon	805,648 06
Losses incured	316,885 00
Nevada Business.	
Risks written	10,000 00
Premiums received	2,853 43
Losses paid	5,000 00

W. S. Wynn Secretary.

He. For the West..

Tell your friends that the colonist rates are going into effect March 1st, 1905 and expire May 15, 1905. The rate from Chicago, Ill, $31.00, St. Louis Mo., New Orleans, La., $30 00, Council Bluffs Ia., Sioux City, Ia., Omaha, Neb., Kansas City, Mo., Mineola, Texas and Houston Texas, $25.00. Rates apply to Main Line points in California and Nevada.